Akin Gump
STRAUSS HAUER & FELD LLP

Labor and Employment Alert

December 19, 2014

Multiemployer Pension Reform Act of 2014

The Multiemployer Pension Reform Act of 2014 (the MPRA), as part of the Consolidated and Further Continuing Appropriations Act of 2015 (the Act), H.R. 83, was passed by the House on December 11, 2014, the Senate on December 13, 2014, and signed by the president on December 16, 2014. A principal goal of the MPRA is to provide the most distressed multiemployer pension plans the flexibility to take necessary action to avoid plan insolvencies. The MPRA also provides additional authority to the Pension Benefit Guaranty Corporation (PBGC), the government insurer of private defined benefit pension plans, to take certain actions to assist critical status multiemployer pension plans. The MPRA also includes some protection against increasing liability for those employers that continue to contribute to multiemployer pension plans. In addition to the MPRA, the Act also includes a single-employer pension plan provision that limits the applicability of ERISA §4062(e), which could have imposed liability upon employers who close down some of their facilities. The following is a summary of those provisions that we find most relevant to contributing employers and plan sponsors. The MPRA provisions shall be effective beginning with the first plan year commencing after December 31, 2014.

Authority to Suspend Benefits Despite the Anti-Cutback Rule

Under the MPRA, the trustees of a multiemployer pension plan (MEP) that is projected to become insolvent within 15 years, regardless of its current funding percentage, or 20 years if it is less than 80 percent funded, shall be permitted to suspend benefits.[1] Benefits cannot be suspended, however, to a level lower than 110 percent of the PBGC guaranteed benefit (the maximum PBGC guaranteed benefit for 30 years of service is $12,870). In any event, benefits cannot be suspended to an amount greater than the level necessary for the plan to indefinitely avoid insolvency. MEPs may not suspend benefits for retirees who are 80 years old or older. Benefits of retirees who are 75 years or older are partially protected.

In order for an MEP to suspend benefits it must first apply to the Treasury Department which will, in consultation with the PBGC and the DOL, make a determination as to whether the MEP and the proposed suspensions meet the requirements of the MPRA. The agencies will have 225 days to notify the MEP that its application failed to meet the requirements or the application will be deemed approved. If the agencies make the determination that the requirements are satisfied, or fail to make any determination within the 225 day period, the trustees of the MEP must then send a notice of the suspension proposal to the participants who shall be given an opportunity to vote on the proposal. If more than 50 percent of all the participants in the plan (not just those who actually vote), including both active and inactive participants, reject the proposal the trustees may not institute the benefit suspensions. However, for

[1] Although the legislation refers to the reduction in benefits as a suspension, the reduced benefits will not be retroactively repaid in the event the MEP recovers, but may be reinstated on a go forward basis.

those MEPs that are systematically significant, the government agencies can still permit the trustees of the MEP to suspend benefits as proposed by the MEP or as modified by the agencies. An MEP with unfunded guaranteed liabilities that would result in a claim against the PBGC of $1 billion or more upon the plan's insolvency is systematically significant for this purpose.

Benefit Suspensions Effect on Withdrawal Liability

Benefit suspensions shall be disregarded for the purposes of calculating an employer's withdrawal liability **during the first 10 plan years** following the benefit suspension. Thereafter, suspended benefits are treated as permanent benefit cuts for the purpose of determining the MEP's unfunded vested benefits. A decrease in unfunded vested benefits will result in less withdrawal liability for those employers who remain in the MEP for at least 10 plan years after the benefit suspension.

Exclusion of Contribution Rate Increases Required Under Funding Improvement Plans and Rehabilitation Plans from Withdrawal Liability Calculation

Under the MPRA, any contribution rate required after the first plan year that begins after December 31, 2014, and that is required as part of a funding improvement plan or a rehabilitation plan shall be disregarded for purposes of calculating a withdrawn employer's total withdrawal liability and the withdrawn employer's annual withdrawal liability payment. An employer's contingent withdrawal liability, however, could still increase if an MEP's unfunded vested benefits increase or the employer's share of an MEP's total contributions increase. But the required increase in an employer's contribution rate will no longer increase the employer's annual withdrawal liability payment in the event of a future withdrawal if the employer's contribution base units do not increase over the relevant period.

Enhanced Disclosure Requirements

The MPRA expands an employer's ability to request copies of plan documents in the possession of an MEP's administrator for at least 30 days and less than six years, including any annual or periodic reports written by the plan's actuary or investment manager. The MPRA also provides for a cause of action to enforce these disclosure provisions.

Additionally, MEPs will be required to include in their annual funding notices a statement as to the date of the plan's projected insolvency, if applicable, and whether the plan has taken the legally permissible measures to avoid insolvency as well as a statement that the insolvency will result in benefit cuts.

Greater PBGC Authority

The MPRA provides clear authority for the PBGC to facilitate plan mergers through technical assistance and the provision of financial assistance to cover a portion of the merged plan's underfunding. This authority is limited to the extent providing such assistance would negatively impact the PBGC's ability to provide financial assistance to other MEPs.

The MPRA also expands the PBGC's authority to grant plan partitions. In a plan partition a plan is split into two plans, one which becomes a terminated plan and the other an ongoing plan. Under the MPRA, the PBGC may partition any plan that is going to be insolvent within 20 years and is currently less than 80 percent the long-term claim on the PBGC. Once partitioned, the PBGC would provide financial assistance to cover the guaranteed portion of the benefit to the extent necessary for an MEP to avoid insolvency. These are the benefits transferred to the terminated plan. The ongoing plan would pay the rest up to the suspended level. **As long as an employer stays in the plan for 10 plan years after the partition, its withdrawal liability would be determined without taking into account the liabilities transferred to the PBGC**. The PBGC's ability to partition plans is also limited by the extent that ordering a partition would negatively impact the PBGC's ability to provide financial assistance to other MEPs.

Eliminates Prohibited Transaction Restriction on Withdrawal Liability Settlements

The MPRA also eliminates the prohibited transaction rule relating to transactions between plans and parties in interest to the extent the prohibited transaction rule applies to any plan arrangement relating to withdrawal liability. Previously, a settlement between an MEP and employer that settled a withdrawal liability claim for less than the full amount may have been subject to the prohibited transaction rules, and thus a potential breach of fiduciary duty, unless it complied with a Prohibited Transaction Exemption. With this change, an MEP will have greater flexibility in agreeing to withdrawal liability arrangements that make sense for that MEP.

Imposition of Default Schedule

Under the U.S. Pension Protection Act (PPA), if the bargaining parties failed to adopt a schedule under the MEP's funding improvement or rehabilitation plan, the default schedule was automatically imposed. The default schedule consisted of cuts to adjustable benefits with no required contribution rate increase unless increases were required to meet the benchmarks of the funding improvement plan or for the MEP to emerge from critical status under the rehabilitation plan. The PPA was silent, however, as to the requirements to adopt a subsequent schedule if the MEP was still in critical or endangered status when the collective bargaining agreement adopting the first schedule expired. Under the MPRA, if the bargaining parties fail to adopt a subsequent schedule, the schedule adopted under the first collective bargaining agreement will be imposed as in effect on the date the contract expires.

Single-Employer Plan – Limitation of ERISA §4062(e)

Prior to the Act, an employer that sponsored a single-employer pension plan and that closed a facility that resulted in 20 percent of its employees being separated from employment could incur liability as though it had withdrawn from a single-employer plan with more than one contributing employer. The PBGC had interpreted this provision as applying even if the employer's overall workforce did not decline as a result of the facility closure (e.g., employees transferred from the closed facility to a new facility) and if the facility was transferred to another employer that also sponsored a single-employer plan and assumed the liability of the transferred employees. PBGC had effectively placed a moratorium on its enforcement of these cases even before this legislation.

The Act reduces the threshold for a §4062(e) event from a 20 percent decline to a 15 percent decline, but significantly limits those employees that are to be included in determining whether a 15 percent decline occurred. If an employer closes a facility, an employee that is separated from service who is replaced within a reasonable time by another employee who is a citizen or resident of the United States is not included in determining the 15 percent reduction. Therefore, an employer would not incur a §4062(e) when it closes a facility but increases its workforce at other facilities within a reasonable time so that there is not a 15 percent decline in the overall workforce.

Additionally, in the case of a sale or other disposition of assets of an employer, those employees who are separated from service from the transferor employer and who are replaced by the transferee employer within a reasonable time with employees who are citizens or residents of the United States are not included in determining whether there is a 15 percent decline if certain conditions are met. Specifically, the transferee employer must continue the operations and within a reasonable amount of time after the sale it must maintain a single-employer pension plan that assumes the pension assets and liabilities, if any, of the employees that were separated from service. Accordingly, a §4062(e) does not occur when an employer sells a facility to a new employer that continues to operate the facility and assumes the pension liability of those employees that were separated from the old employer.

Contact Information

If you have any questions regarding this alert, please contact:

Larry Levien
llevien@akingump.com
202.887.4054
Washington, D.C.

Eric Field
efield@akingump.com
202.887.4146
Washington, D.C.

Beth Cyr
ecyr@akingump.com
202.887.4518
Washington, D.C.

